BRIEF FOR RESPONDENTS

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,544

STOCKTON PORT DISTRICT,

Petitioner,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF ORDER OF
THE FEDERAL MARITIME COMMISSION

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MISCELLANEOUS

COUNTERSTATEMENT OF THE CASE

This is a petition to review a Report and Order of the Federal Maritime ommission dated September 24, 1965, as amended September 28, 1965, issued n the Commission's Docket No. 1086, Stockton Port District v. Pacific estbound Conference, et al. The substance of the proceeding related to onference agreements and tariffs which permit port equalization whereby onference carriers may equalize inland transportation costs between terminal orts. Stockton Port District, the petitioner, urged the Commission to order he Conferences to delete the port equalization rules from conference tariffs.

The Hearing Examiner issued an initial decision on September 24, 1964. xceptions were taken thereto and oral argument was held before the Commission. he Hearing Examiner concluded and the Commission found that equalization as racticed by the Conferences against Stockton was lawful under the Shipping Act, 916, but that equalization on cargo loaded at Long Beach and Los Angeles was njustly discriminatory and unfair to terminal ports in the San Francisco Bay rea. The petitioner contended that the agreements of the Conferences and the onference tariffs, are prejudicial to the Port of Stockton and contrary to tatutory provisions.

The tariff rules which Stockton seeks to have declared unlawful provide hat a carrier may reimburse a shipper for the difference between the shipper's nland transportation costs to Stockton, if it is nearer, and the shippers' nland transportation costs to any San Francisco Bay area terminal port of oading. Thus, the total outbound cost is the same to the shipper regardless f which of the two ports is used. Stockton alleges that this results in iversion of cargo normally tributary to Stockton. The volume of outbound

argo moving from Stockton has increased considerably in recent years. Since ugust 1957 the Port of Stockton has had phenomenal growth. (C.R. 5, R. 1270)[1/]

On the basis of evidence considered, the Commission treated Stockton s an integral part of the San Francisco Bay "harbor complex" and thus as eing within the same "geographical area" which has access to the open sea hrough the Golden Gate. The territory surrounding Stockton and the entire ay area was found by the Commission to be centrally, economically and aturally served by the Conference vessels at San Francisco. The Commission lso found that the areas naturally tributary to Stockton were equally naturally ributary to San Francisco.

ARGUMENT

Petitioner urges existence of numerous errors which may be reduced to he following issues:

1. Was the conclusion of the Federal Maritime Commission that the ports f San Francisco and Stockton are both "bay area" ports and in the same geographical area" supported by substantial evidence?

2. Was the conclusion that the equalization practices complained of here ere not unjustly discriminatory and unlawful, as reached by the Federal Maritime ommission, arbitrary, capricious, an abuse of discretion and not supported by ubstantial evidence?

3. Was the decision of the Federal Maritime Commission contrary to pplicable law?

1/ C.R. refers to the Commission Report of September 24, 1965.

THE CONCLUSION OF THE FEDERAL MARITIME COMMISSION THAT THE PORTS OF SAN FRANCISCO AND STOCKTON ARE BOTH "BAY AREA" PORTS AND IN THE SAME "GEOGRAPHICAL AREA" IS SUPPORTED BY SUBSTANTIAL EVIDENCE, AND IS NOT ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION OR ERRONEOUS.

The Commission considered testimony of witnesses, examined economic data historical background of the area as well as government publications in ermining that Stockton and San Francisco were both bay area ports in the e harbor complex and in the same geographical area. The Commission, in opinion, quoted from Acts of the California Legislature, Harbors and igation Code § 1908 which defined the San Francisco Bay Area as

> "that region served by commercial shipping and transportation passing through the Golden Gate, including tributary areas of central and Northern California."(C.R. 12, R. 1277)

Commission did not rely upon petitioner's assertion of physical separation being sufficient to establish Stockton as being in a separate area from Francisco. The Commission stated that mileage alone is not a determinative tor. It examined, as relevant, the economics of transportation and the ural flow of commerce. The Commission found that the natural direction of flow of traffic from the San Joaquin valley is through the Golden Gate to Pacific Ocean. The Commission further noted that San Francisco had been principal port for such traffic for almost one hundred years before ckton became a port. (C.R. 13, R. 1278)

This finding that the tributary territory of Stockton was wholly within territory attributed to San Francisco was reinforced by a similar under-nding as to the ports encompassed within the area as set forth in a joint

ication of the Maritime Administration, Department of Commerce and Corps
ngineers, Department of the Army, "The Ports of San Francisco and Redwood
, California" Port Series, No. 30, Rev. 1951. (C.R. 15, R. 1280)
The mere fact that the ports of Stockton and San Francisco are in the
port complex and geographic areas was not, however, the sole consideration
he Commission in finding lawful the equalization practices for cargo via
Francisco.

THE CONCLUSION OF THE FEDERAL MARITIME COMMISSION THAT THE EQUALIZATION OF CARGO VIA SAN FRANCISCO DID NOT RESULT IN UNJUST OR UNFAIR DISCRIMINATION IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS NOT ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, OR ERRONEOUS.

In making its determination that the equalization practices which it found
ul were not unfair or unjustly discriminatory the Commission considered
imony of shippers and carriers as well as port authorities. While Stockton
med to have lost $232,000 in potential revenue as a result of equalization
tices, the Commission found the exact extent of the loss speculative.
. 13-14, R. 1278 and 1279) The Commission determined that notwithstanding
loss of some revenue there was "ample economic and cost justification for
discrimination against Stockton, such as it is." It found that it cost an
age additional amount of $3,600 to send a vessel to Stockton and, therefore,
ould have cost the carriers approximately $67,000 more than the $113,030
of equalization. (C.R. 14, R. 1279) It is an eight hour trip in each
ction for a vessel to go the additional distance to Stockton. The Commission
d that equalization procedures gave the carrier operational flexibility and
tude in loading and scheduling. It further found that equalization is
tantially cheaper than transshipment (C.R. 7, R. 1272) and that the fewer

ading ports in an itinerary, the better will be the operating results of the rrier. While the Commission recognized that elimination of equalization would beneficial to the Port of Stockton and perhaps some of the shippers in that , the Commission determined that equalization reflected an overall economic od, tangible benefit to the public at large, and an important transportation stification. (C.R. 20, R. 1285) The Commission noted that even with equal-ation Stockton experienced phenomenal growth since 1957. (C.R. 22, R. 1287) , therefore, concluded that the prejudice or discrimination against Stockton sulting from equalization in favor of San Francisco was not so undue or unjust to warrant disapproval.2/

In urging this Court to set aside the findings of the Commission the titioner has merely made charges and allegations. Petitioner argues that e findings and conslusions of the Federal Maritime Commission are arbitrary, pricious and not supported in fact. The petitioner has not, however, sustained e burden required of it in urging this position. Section 10(e) of the ministrative Procedure Act (5 U.S.C. 1006) gives a reviewing court authority "set aside agency action, findings and conclusions found to be (1) arbitrary, pricious /or/ an abuse of discrimination.../or/ (5) unsupported by substantial

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The foregoing is dispositive of petitioner's contentions that the decision approves an agreement in violation of sections 15 and 16 (First), Shipping Act, 1916.

evidence . . . ." The Supreme Court has defined substantial evidence as:

> "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. Labor Board, 305 U.S. 197, 229. "[I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." Labor Board v. Columbian Enameling & Stamping Co., 306 U. S. 292, 300. This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Labor Board v. Nevada Consolidated Copper Corp., 316 U. S. 105, 106; Keele Hair & Scalp Specialists, Inc. v. FTC, 275 F. 2d 18, 21.
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> These policies are particularly important when a court is asked to review an agency's fashioning of discretionary relief. In this area agency determinations frequently rest upon a complex and hard-to-review mix of considerations. By giving the agency discretionary power to fashion remedies, Congress places a premium upon agency expertise, and, for the sake of uniformity, it is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency. Consolo v. Federal Maritime Commission, et al., 383 U. S. 607 at 620, 621 (1966). (Footnotes omitted).

The major issue to which the Commission had to address itself was whether or not there was undue or unreasonable prejudice or discrimination. The conclusions of the Commission on this issue should not be set aside since there is evidence to support them.

"Whether a discrimination in rates or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed to the judgment of the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic." Swayne & Hoyt, Ltd. et al. v. U. S., 300 U.S. 297 at 304 (1937). See, also, U. S. Navigation Co. v. Cunard Steamship Co., 284 U.S. 474 (1931)

itioner also urges that because the Commission found unjust discrimination equalization as practiced against Stockton in connection with citrus fruits ded in Southern California the Commission must also find unjust discrimination equalization against Stockton in favor of San Francisco and it must now be d that equalization between San Francisco and Stockton be disallowed. ever, this alleged inconsistency merely serves to demonstrate that the mission considered the evidence of different facts and different circumstances arriving at a different conclusion for two separate circumstances and con- ions. With reference to equalization in favor of Southern California the mission found that there would be diversion of traffic from areas not mally naturally tributary to Southern California and that there would be ue prejudice and unjust discrimination.

To require an agency or court to arrive at the same conclusions based on ferent evidentiary findings is a new and novel legal theory. The Supreme rt dealt with this argument as follows:

"to hold otherwise would be to create the doubtful and perhaps dangerous precedent that the decision of the

Board in respect of one agreement definitely establishes that the rule of that decision must, without more, be applied to other agreements alleged to be of a similar character, although it may turn out upon investigation that the allegations are not warranted, or the facts and circumstances surrounding the transaction are so wholly different as to afford grounds for a different result." U. S. Navigation Company v. Cunard Steamship Co., 284 U.S. 474 at 488, (1931).

PORT EQUALIZATION IS NOT UNLAWFUL

The concept of port equalization is not illegal per se and petitioner not urge illegality per se. Petitioner does, however, allege that the sion of the Commission approves a practice which violates the following:

a. Section 8 of the Merchant Marine Act of 1920.

b. Section 205 of the Merchant Marine Act, 1936.

c. Section 16 of the Shipping Act, 1916.

d. Section 15 of the Shipping Act, 1916.

A. THE DECISION OF THE COMMISSION DOES NOT UPHOLD VIOLATION OF SECTION 8 OF THE MERCHANT MARINE ACT, 1920

Petitioner alleges that section 8 of the Merchant Marine Act, 1920 uld be held applicable to condemn the port equalization practices herein olved on the ground that section 8 expresses the intent of the Congress favor port improvement and development and to encourage the use by vessels ports adequate to care for the freight which would naturally pass through

m.[3] Petitioner relies upon the case of Pacific Far East Line v. United States, F. 2d 711 (C.A., D.C. 1957). That decision, however, merely approved the act

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Section 8 provides:

> "That it shall be the duty of the board, in cooperation with the Secretary of War, with the object of promoting, encouraging, and developing ports and transportation facilities in connection with water commerce over which it has jurisdiction, to investigate territorial regions and zones tributary to such ports, taking into consideration the economies of transportation by rail, water, and highway and the natural direction of the flow of commerce; to investigate the causes of the congestion of commerce at ports and the remedies applicable thereto; to investigate the subject of water terminals, including the necessary docks, warehouses, apparatus, equipment, and appliances in connection therewith, with a view to devising and suggesting the types most appropriate for different locations and for the most expeditious and economical transfer or interchange of passengers or property between carriers by water and carriers by rail; to advise with communities regarding the appropriate location and plan of construction of wharves, piers, and water terminals; to investigate the practicability and advantages of harbor, river, and port improvements in connection with foreign and coastwise trade; and to investigate any other matter that may tend to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally pass through such ports: Provided, That if after such investigation the board shall be of the opinion that rates, charges, rules, or regulations of common carriers by rail subject to the jurisdiction of the Interstate Commerce Commission are detrimental to the declared object of this section, or that new rates, charges, rules, or regulations, new or additional port terminal facilities, or affirmative action on the part of such common carriers by rail is necessary to promote the objects of this section, the board may submit its findings to the Interstate Commerce Commission for such action as such commission may consider proper under existing law."

the Federal Maritime Board, predecessor of the Federal Maritime Commission, amining certain practices in the light of the policy set forth in section 8. e Board found the practice therein involved to be unfair and unjustly dis- minatory on the basis of the facts. The Board relied upon the policy set rth in section 8 in arriving at its decision. The Court upheld the decision the Board and the authority of the Board to consider section 8 in making s determinations. The Board was merely free to examine the issue raised in e light of the policy of section 8. The court stated as follows:

> "That policy having been expressed, the Board could, if it was not bound to do so, examine the practices here complained of in the light of that policy, and exercise its power to approve or disapprove such practices accordingly." (Emphasis supplied.) 246 F.2d at 716.

arriving at the conclusions which petitioner seeks to have set aside the mmission did consider policies set forth in section 8. (CR 12, R. 1277)

It is clear that the Commission considered regions and zones tributary to e ports involved, economics of transporation, the natural direction of the ow of commerce, and facilities of the ports, as well as the policy set forth section 8. Having examined the issues and evidence in the light of section the Commission exercised its power to approve the equalization practices. so doing the Commission recognized the economies of equalization as compared transshipment (C.R. 21, R. 1286) and it considered the welfare of the rriers, shippers and general public. It had determined that while some affic was diverted from Stockton there was, in the region and zone involved, diversion of traffic that was solely and exclusively tributary to Stockton

.R. 13, R. 1288). Delineation of a "geographic area" will almost always necessity involve the inclusion of parties whose inland ports will vary in stance or in mileage. The Commission, exercising its expertise, delineated e area involved and found the cargo traffic involved was naturally tributary both ports. (C.R. 16, R. 1291)

It further should be pointed out that section 8, in actuality, relates imarily to rates, charges, rules or regulations of common carriers by rail, d, therefore, except as a broad statement of policy, has no relationship to es, charges, rules or regulations of common carriers by water.

B. THE DECISION OF THE COMMISSION IS NOT CONTRARY TO SECTION 205 OF THE MERCHANT MARINE ACT, 1936

Petitioner alleges that equalization as practiced against Stockton in vor of San Francisco is in violation of section 205 of the Merchant Marine , 1936.[4/] It says that the equalization rule prevents a carrier, which ld otherwise send its vessel to Stockton, from serving Stockton. Petitioner mistaken.

Section 205 of the Merchant Marine Act, 1936 provides as follows:

> "Without limiting the power and authority otherwise vested in the Commission, it shall be unlawful for any common carrier by water, either directly or indirectly, through the medium of an agreement, conference, association, understanding, or otherwise, to prevent or attempt to prevent any other such carrier from serving any port designed for the accommodation of ocean-going vessels located on any improvement project authorized by the Congress or through it by any other agency of the Federal Government, lying within the continental limits of the United States, at the same rates which it charges at the nearest port already regularly served by it."

No functions, with respect to this section of the 1936 Act were transferred to the Federal Maritime Commission by Reorganization Plan No. 7 of 1961 which established the Commission. Accordingly, the Commission in arriving at a decision is not bound by the provisions of that section of the Act. At best such provisions would be a guide for the Commission to follow in its determination. In any event as we point out in the text the Commission decision

Stockton is served at the same rates as the Conference charges at nearest
ts regularly served by them, since rates are the same for all bay terminal
ts. Other carriers are not precluded from or prevented from serving Stockton
ause of the necessity of being in competition with other carriers. That
egation of the petitioner is simply not founded in fact. The ultimate cost
shippers is the same regardless of whether shipment is through Stockton or
ther port such as San Francisco. There is sufficient evidence supporting
s conclusion (C.R. 6, R. 1271) including evidence that carriers who are
cticing equalization or have the rules of equalization available to them
serving the port of Stockton at various times. In 1962 the Pacific West-
nd Conference members made a total of 133 calls at Stockton. Pacific Far
t Line made 30 at Stockton, and American President Lines made 24 calls.
ordingly, there is nothing in the decision of the Commission or under the
alization rules involved herein that are not in conformity with section 205
the Merchant Marine Act, 1936.

C. THE DECISION OF THE COMMISSION IS NOT CONTRARY TO SECTION 16 (SECOND) OF THE SHIPPING ACT, 1916

Petitioner alleges that the practices involved result in an unlawful
ate in violation of section 16 (second) of the Shipping Act, 1916 (46 U.S.C.
). This contention is without foundation. Discrimination against a shipper
necessarily measured by what the shipper pays, not by what the carrier
imately collects. Under similar circumstances the Commission, in Beaumont
rt Commission v. Seabrain Lines, 7 U.S. M.C. 693, found no evidence of dis-
mination against shippers. All shippers similarly situated pay the same

l price for ocean carriage. The rules and practices of equalization are
ly and publicly set forth, tariffs are publicly filed and all shippers
ascertain what the total cost of shipments will be for themselves and other
pers similarly situated. Discrimination is measured by what the shippers
and shippers who receive equalization pay the same amount for through
sportation whether they ship via Stockton or San Francisco.

The practices outlawed by section 16 of the Shipping Act of 1916 are
e practices which would allow a person to obtain transportation at
than regular rates by means of false billings, false reports, false
sifications or other unfair, unjust devices and means. These are not
lved in the equalization rules or practices. The entire transaction is
losed. The limitations and restrictions of section 16 of the Shipping
are directed to surreptitious activities. See Ambler, et al. v. Blodel
van Lumber Mills, (CA 9 1933) 68 F.2d. 268, at 271 and Hohenberg Brothers
v. Federal Maritime Commission, 316 F.2d 381 at 385 (CADC 1963).

D. THE DECISION OF THE FEDERAL MARITIME COMMISSION IS NOT CONTRARY TO SECTION 15 AND 16 OF THE SHIPPING ACT, 1916

Petitioner alleges that the equalization rules and practices are violative
ections15 and 16 (First) of the Shipping Act, 1916 in that they are unfair,
stly discriminatory and unduly prejudicial against the Port of Stockton.
Commission properly found as discussed earlier, under point II,that there
no unfairness, undue prejudice or unjust discrimination.

In view of the foregoing it would appear that petitioner's contention
rest upon an allegation that equalization is illegal per se. However,

argument was not set forth because such an argument would be clearly acious. Only when there is unfair or unjust discrimination would such a tice be illegal. There have been no decisions in which equalization between s on the same harbor or ports having common tributary areas has been disoved. See Beaumont Port Commission v. Seatrain, 2 USMC 699. The concept ate adjustment to meet competition by carriers has been upheld in numerous sions. To deny rate equalization if pressed to its logical conclusion rally "would result in traffic flowing only through the most distance red port." Boston & Marine Railroad v. United States, 202 F. Supp. 837 (USDC Mass., 1962).

CONCLUSION

The Federal Maritime Commission fully and adequately supported its findings d on extensive evidence considered by it and by the Hearing Examiner. The ission distinguished the equalization practices herein involved from those h were disapproved in other proceedings. The Commission found that the lization practices with reference to San Francisco were not unfair, unly discriminatory or unduly prejudicial to the Port of Stockton, a type finding which courts have found to be primarily and peculiarly within the ince of the administrative agency. The Commission followed the applicable in arriving at its decision. The Commission further indicated in its sion that it considered all issues raised by the petitioner whether or not ddressed itself specifically to them. In much the same manner that petier bombarded the Commission with numerous ill-conceived exceptions to the ing Examiner's decision, the petitioner has bombarded this Court with alleged

rors in its attempt to grasp upon some basis for justifying the setting aside the Commission's findings and decision. The petition should be dismissed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL AND OF SERVICE

I certify that, in connection with the preparation of this brief, I examined Rules 18 and 19 of the United States Court of Appeals for Ninth Circuit, and that, in my opinion, the foregoing brief is in full liance with those rules.

I further certify that I have this day served three copies of the fore- g brief via first-class airmail, postage prepaid, upon the following:

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Dated at Washington, D. C. this 11 th day of August 1966.

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